# Wong Pot Heng & Anor v Zainal Abidin Putih & Anor

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NOS 02-299 OF 1989 AND 02-320 OF 1989
MOHAMED AZMI, AJAIB SINGH AND GUNN CHIT TUAN SCJJ
25 MAY 1990

*Companies and Corporations — Division of assets of co-operative society — Society placed under receivership — Priority — Essential (Protection of Depositors) Regulations 1986, regs 9(1) & 13*

As a result of the financial collapse of the Co-operative Central Bank Ltd ('CCB') it was placed under receivership under the Essential (Protection of Depositors) Regulations 1986. One consequence was that the employees were retrenched by the receivers (respondents) and these included the appellants in these cases. The question that arose in these cases was the priority of payments of the appellants' claims as former CCB employees, as against the receivers, depositors and other creditors. Under reg 13 of the 1986 Regulations, the receivers have priority over all other claims. The High Court had ruled, on the application of the receivers for directions, that immediately after the receiver's liabilities, the CCB deposit liabilities should take priority over payments for employees' liabilities and all other liabilities, including those entitlements under Industrial Court awards or those pertaining to employees' retrenchment termination or lay-off benefits and employees' contractual entitlements under contracts of employment. The appellants appealed.

**Held,** allowing the appeal:
It is obvious that under reg 13 of the 1986 Regulations, apart from the specified liabilities, all other liabilities have no priority and must rank equally. Therefore, both the appellants should rank equally with the depositors immediately after the receivers.

[Akibat dari kejatuhan pengurusan Bank Koperative Pusat ('CCB') ia telah diletakkan di bawah pengawasan (receivership) di bawah Peraturan-Peraturan Perlu (Perlindungan Penyimpan Wang) 1986. Berbangkit dari itu pekerja CCB itu telah diberhentikan pekerjaan mereka oleh pengawas harta benda (receiver-respondents) dan ini termasuk perayu-perayu di dalam kes-kes ini. Soal yang timbul di dalam kes-kes ini ialah prioriti pembayaran tuntutan perayu sebagai bekas pekerja CCB, berbanding dengan pengawas harta benda, penyimpan-penyimpan wang dan lain-lain sipiutang. Di bawah peraturan 13, Peraturan 1986, tuntutan pengawas harta benda diberi prioriti di atas semua tuntutan lain. Mahkamah Tinggi telah memutuskan, atas permohonan oleh pengawas harta benda mendapat arahan, bahawa selepas sahaja liabiliti kepada pengawas harta benda, liabiliti kepada penyimpan-penyimpan wang hendaklah diberi prioriti pembayaran di atas tanggungan pekerja dan lain-lain tanggungan, termasuk tanggungan di bawah award Mahkamah Perusahaan dan tanggungan berhubung dengan faedah bagi pengurangan kerja, penamatan kerja dan lay-off dan hak-hak pekerja di bawah kontrak pekerjaan mereka. Perayu telah merayu dari keputusan Mahkamah Tinggi itu.

**Diputuskan,** membenarkan rayuan itu:
Adalah jelas bahawa di bawah peraturan 13, Peraturan 1986 itu, selain daripada tanggungan yang disebutkan, semua tanggungan lain tidak mempunyai apa-apa prioriti dan semuanya berperingkat sama. Oleh kerana itu kedua-dua perayu hendaklah berperingkat sama dengan penyimpan-penyimpan wang, selepas sahaja tanggungan pengawas harta benda (receiver).]

**Cases referred to**
1 *Nge Siew Noon* v *Sitiawan Credit Corp Sdn Bhd* [1989] 1 MLJ 355 (refd)
2 *Bank Negara Malaysia* v *Ali Abdul Kadir & Ors* (Originating Summons No R8-31-15-87) (unreported) (refd)
3 *R* v *Board of Trade, ex p St Martin's Preserving Co Ltd* [1965] 1 QB 603 (refd)
4 *Chapman* v *Chapman* [1961] 1 WLR 1481 (refd)
5 *Fothergill* v *Monarch Airlines* [1980] 3 WLR 209 (refd)
6 *Maritime Life Assurance Co* v *Chateau Gardens (Hanover) Inc* (1984) 2 DLR (4) 553 (distd)
7 *International Harvester Export Co* v *International Harvester Australia Ltd* [1982] 1 ACLC 580 (distd)
8 *Workers of M/S Rohtas Industries Ltd* v *M/S Rohtas Industries Ltd* [1987] 2 SC 588 (distd)
9 *R* v *Wimbledon Justices, ex p Derwent* [1953] 1 QB 380 (refd)
10 *Cape Brandy Syndicate* v *Inland Revenue Commissioners* [1921] 1 KB 64 (refd)

**Legislation referred to**
Banking Act 1973 s 47
Companies Act 1965 s 247(3) and 292
Essential (Protection of Depositors) Regulations 1986 regs 9(1) and 13
Industrial Relations Act 1967 s 32(1)(b)

**Appeal from:** Originating Summon No R8-24-70-89 (High Court, Kuala Lumpur)

*V Kanagalingam* for the appellants.
*N Chandran* (*P Jayasingam* with him) for the respondents.
*John Mathew* watching brief for Bank Negara.

*Cur Adv Vult*

**Mohamed Azmi SCJ** (delivering the judgment of the court): One unfortunate consequence of the financial collapse of the Co-operative Central Bank Ltd ('CCB') when it was put on receivership on 7 March 1989 under the Essential (Protection of Depositors) Regulations 1986, was the retrenchment of its employees by the respondents/receivers on 30 March the same year. Not even Encik Wong Pot Heng, the former CCB general manager (the appellant in SCCA No 02-299 of 1989), and Tuan Hj Rosli bin Hj Kamaruddin, the former CCB deputy chief executive (the appellant in SCCA No 02-320 of 1989), were spared the axe in a bold salvage operation to keep the CCB afloat.

Both these appeals have been heard together because they are concerned with the same question of priority of payments of the appellants' claims as former CCB employees, as against the receivers, depositors and other creditors. Under reg 13 of the 1986 Regulations, the appellants concede that the receivers have priority to all other claims. That regulation provides:

> All proper costs, charges and expenses, including remuneration, of receivers and other persons appointed under these Regulations shall be payable out of the assets of the deposit-taker in priority to all other claims.

But they challenge the order of the High Court given at Kuala Lumpur on 9 August 1989 on the application of the receivers for directions, which ruled that immediately after the receivers' liabilities, the CCB deposit liabilities should take priority over payments for employees' liabilities and all other liabilities, including those entitlements under Industrial Court awards or those pertaining to employees' retrenchment termination and/or lay-off benefits and employees' contractual entitlements under contracts of employment.

The appellant Wong is dissatisfied with the order of the learned judge, because as a former employee of the CCB he contends that his claim for arrears of salary under an award of the Industrial Court should take priority over the claim of the depositors who in reality are mere customers of the CCB. Two days after the CCB was put under receivership, the Industrial Court by its Award No 32 of 1989 had found Wong's dismissal on 31 July 1986 wrongful and ordered for his reinstatement with payment of back wages and other benefits from the date of his wrongful dismissal to the date of reinstatement (see appeal record at pp 59 to 75). He was reinstated by the respondents on 16 March 1989 but due to the receivership, he was again retrenched on 30 March 1989 with the other employees. It is the submission of his counsel that his claim for back wages and other benefits under the award made pursuant to the Industrial Relations Act 1967 should be given priority having regard to the socio-economic object of the Act in protecting the rights of workers and in maintaining industrial peace, and also to the penal consequences imposed by s 56(3) for non-compliance with such an award. Neither the CCB nor the respondents have taken any step to quash the award. Further, although Hj Rosli and the other employees were paid their salaries up to the date of termination of their services, it is argued that Wong has not even been paid his salary from the date of his reinstatement (16 March 1989) to the date of retrenchment (30 March 1989) although the learned judge has said in his judgment that 'wages of employees should be given priority over deposit liabilities of the CCB'.

As regards Hj Rosli, his claim for termination benefits is grounded under cl 23 of his fixed term contract of service which provides that the CCB 'shall compensate the executive by paying him upon such termination a sum of money equivalent to the total basic salary together with all allowances payable which he would have earned during the unexpired term of contract as if he had not been terminated from service'. As a retrenched employee, he claims priority under the contract of employment.

In the course of his judgment, the learned judge advanced the following major reasons for granting priority of payments to the depositors:

> It is pertinent to note that the receivers were appointed under reg 9(1)(c) of the Regulations which is a special law made by the Yang di-Pertuan Agong under the Emergency (Essential Powers) Act 1979. The main object of the Regulations is to protect the interests of depositors. This can be gathered first from the title of the Regulations itself, which is Essential (Protection of Depositors) Regulations 1986. Secondly, to ensure that the interests of the depositors are well protected, the Regulations give the Central Bank wide powers to investigate the affairs of any deposit-taker, and if necessary to do one or more of the matters enumerated in reg 9 of the Regulations.

The learned judge referred to s 47 of the Banking Act 1973 which provides:

> Where a licensed bank becomes unable to meet its obligations or suspends payments, the assets of the bank in the Federation shall be available to meet all deposit liabilities of the bank in the Federation; and such deposit liabilities shall have priority over all other liabilities of the bank.

In concluding his argument on priority the learned judge said:

> The plaintiff's affidavit affirmed on 3 July 1989 shows that the deposit liability of the CCB as on 28 February 1989 was $1.538bil; and its other liabilities came to about $20m. As against such liabilities the total realizable asset value of the bank as at 28 February 1989 was in the sum of $720m. This clearly shows that the CCB is unable to meet its obligations. The CCB is a bank. It is only reasonable having regard to the object of the Regulations, and by analogy, s 47 of the Banking Act 1973 that the depositors should be given priority of payment out of the CCB assets over the CCB employee's claim for termination benefits. I say so because wages due to the CCB employees whose services had been terminated had been settled up to the dates of the termination of their employments. Otherwise wage of employees should be given priority over deposit liabilities of the CCB.

Before us, it is made manifestly clear that the respondents do not dispute their liability either on Wong's claim under the award of the Industrial Court or on Hj Rosli's claim for termination benefits under his contract of employment arising from the general retrenchment of CCB employees on 30 March 1989. This fair concession can be found in the respondents' written submission at p 6 which states:

> The respondents do not dispute that they were ex-employees of CCB. The respondents also do not dispute their entitlement to claim whatever is due and payable to them under their contracts of employment and/or any award or judgment following the termination of their services by the respondents. What the respondents do not concede is that their termination is wrongful.

On Wong's dismissal in 1986, since the Industrial Court Award in his favour had not been challenged by the respondents, and since they had in fact reinstated him pursuant to the award, it is not open for them now to contend that his 1986 dismissal was not wrongful. As regards the 1989 retrenchment of employees, neither counsel for Wong nor for Hj Rosli has seriously indicated to us that

they are challenging the validity of the termination of their services. Indeed, looking at the powers given to the respondents by the courts at pp 53 to 57 of the appeal record, there can be no doubt that they are entitled to terminate the services of the appellants particularly under item (XV).

Before us, the respondents also do not dispute that they were appointed as receivers to manage the affairs and property of CCB by the order of the High Court, and that the appointment order was made pursuant to reg 9(1)(c) of the 1986 Regulations. They contend that their application for the order of priority was made pursuant to the appointment order and the specific powers expressed therein, in particular item (XVI) which includes, inter alia, the power, 'to enforce or protect' CCB's rights; and item (XIX) which enables them 'to do all things incidental to and conducive in executing the powers and duties herein of the receiver'. They support the finding of the learned judge that the 1986 Regulations is a special law, the paramount object of which is to protect the interests of the class of persons who are the depositors. The said paramount object can be gathered from the title of the Regulations itself. They also made reference to the case of *Nge Siew Noon* v *Sitiawan Credit Corp Sdn Bhd & Anor*[1] where Peh Swee Chin J said at p 357:

> Action was taken by the government obviously to protect those who deposited their money with the defendant, and in a sense, an emergency situation had come into existence threatening 'the economic life' of those depositors on account of the supervening insolvency of the defendant, which took the deposit of these depositors. One of the ways to protect them would be to give back all the depositors a percentage of the refund of their deposits rather than to leave them in the lurch with nothing to hope for.

They also refer to an unreported case of *Bank Negara Malaysia* v *Ali Abdul Kadir & Ors*[2] where Harun J (as he then was) briefly held:

> Interveners have no better claim than the other depositors. Here receiver has edge over judgment creditor as execution not completed.

From the sketchy judgment made available to us, it is difficult to determine with certainty whether Harun J intended to give priority of payments to any particular party, and if so on what ground.

As regards the appellant Wong, the respondents contend that the award of the Industrial Court is not a judgment debt, and by virtue of s 56 of the Industrial Relations Act 1967, only after non-compliance proceeding will the award become registrable with the sessions court or the High Court so as to convert the award into a judgment. As such, they should not have priority. With regard to Hj Rosli, the respondents point out that his claim is merely an anticipated one. He should not get any priority as he is in no better position than any other unsecured creditor. In the event, they submit that the learned judge is correct in giving the depositors priority over both the appellants.

In our view the power 'to manage the affairs and property' of the CCB connotes a very wide power of management especially under the word 'affairs'. In the *Shorter Oxford English Dictionary*, the word 'affairs' means 'what one has to do, or has to do with; business; mainly a concern'. Thus, in *R* v *Board of Trade, ex p St Martin's Preserving Co Ltd*[3] the 'affairs' of a company were held to include the affairs of a subsidiary. In *Chapman* v *Chapman*,[4] 'affairs' for the purpose of establishing whether a person is of mind, so unsound that he cannot manage himself and his affairs 'must be held to include the problems of work, society and marriage'. Thus, when the respondents were appointed by the High Court as receivers on 7 March 1989, to manage the affairs and property of the CCB, the appointment and the power conferred on them must relate to management and are meant to put them legally in the shoes of the former board of directors of the CCB with all its rights and liabilities whether statutory or contractual. As regards the award, they are also liable as 'successor, assignee or transferee' under s 32(1)(b) of the Industrial Relations Act 1967. Accordingly there can be no argument that the respondents are indeed liable to pay retrenched workers not only their salaries but also moneys payable under any award of the Industrial Court or under any contract of employment, in the same way that they are liable to refund the moneys of depositors. It does not matter what the nature of the debt is in each particular case, because they are all admittedly unsecured creditors of the CCB. The only issue for determination therefore is whether the learned judge was right in allowing the depositors priority of payments over the retrenched appellants.

One major difficulty in this appeal is the finding of the learned judge that 'wage of employees should be given priority over deposit liability', which would appear to be at variance with his order that depositors should get priority of payment over the appellant Wong. Surely it does not matter whether the wages of the retrenched employees relate to prior or present liabilities of the CCB. Nor does it make any difference whether the liabilities arise out of statutory or contractual obligations. In a retrenchment situation, it is also difficult in principle to justify a distinction between wages and other benefits due to the retrenched workers, or between current and arrears of wages due under an award of the Industrial Court particularly when the order of reinstatement for wrongful dismissal has been complied with. Counsel for the appellants argues that if the learned judge was correct in holding that wages of employees should be given priority over deposit liabilities, then, it must necessarily follow that at least in the case of the appellant Wong, his claim for arrears of salary should be given priority over the depositors.

We shall now consider the relevant provisions of the 1986 Regulations. Under reg 9(1), where the Central Bank, ie Bank Negara, is satisfied that a body like the CCB is a deposit-taker, it may do one or more of the following for the protection of the depositors:

(a) require the deposit-taker to forthwith cease all or any transactions or activities relating to its business, and refund all moneys paid by any depositor in such manner as the Central Bank may direct;

(b) assume control of and carry on the whole or any part of the business of the deposit-taker as the Central Bank deems fit, or appoint any person to do so on the Central Bank's behalf;

(c) apply to the High Court to appoint a receiver to manage the affairs and property of the deposit-taker and for such incidental or ancillary orders or directions in relation to such appointment as may, in the opinion of the Central Bank, be necessary or expedient;

(d) in the case of a corporation, present a petition to the High Court for the winding up of the corporation, and the court shall accordingly have the power to make an order for the winding up of the corporation, notwithstanding anything contained in the Companies Act 1965;

(e) in the case of a co-operative society, require the Registrar-General of Co-operative Societies to make an order for the cancellation of the registration of the co-operative society, and the Registrar-General shall accordingly cancel the registration of the co-operative society and shall have the power to do so upon being so required notwithstanding anything contained in the Co-operative Societies Act 1948; or

(f) in the case of a pawnbroker, direct any licensing officer appointed under subsection (2) of section 10 of the Pawnbrokers Act 1972 to cancel the licence granted under the Act to the pawnbroker, and such licensing officer shall accordingly cancel the licence and shall have the power to do so on being so directed notwithstanding anything contained in that Act.

But by virtue of reg 9(2) because the CCB is registered as a co-operative society with limited liability under the Co-operative Societies Act 1948, Bank Negara cannot exercise any of the powers conferred under reg 9(1) unless it is satisfied that the CCB is unable or is likely to become unable to meet its deposit liability to any extent. Thus in relation to a co-operative society, depending on the state of insolvency of the deposit-taker at the relevant time and other considerations that Bank Negara may deem necessary to take into account, the choice of actions that it finally takes under the provisions of reg 9(1) would in our view reflect the type of salvage operation and consequently the extent or degree of protection that it intends to confer on the depositors.

For total or complete protection of the depositors in relation to a co-operative society, Bank Negara would in our opinion be expected to act under para (a) which would ensure the refund of all moneys paid by the depositors, or under para (b) by assuming direct control of the deposit-taker and pursuant to regs 9(3)(a) either by itself or its appointees, carrying on the whole or any part of the business of the deposit-taker until such time as:

(i) the deposit liabilities of the deposit-taker have been repaid or the Bank Negara is satisfied that suitable provision has been made for their repayment; or

(ii) Bank Negara is of the opinion that it is no longer necessary or expedient to do so.

In the case of the CCB, Bank Negara has deemed it necessary and expedient to apply to the High Court under para (c) of reg 9(1) to appoint receivers to manage the affairs and property of the CCB, and to apply for incidental or ancillary orders or directions in relation to such appointment as contained in the court order of 7 March 1989 (see pp 51 to 57 of the appeal record). We must not therefore confuse the application made to the High Court by Bank Negara and the subsequent application made to the same court by the receivers which has given rise to the dispute under appeal. The former, not the latter, would determine the degree and type of protection to be given to the depositors under reg 9. The distinction in our view is important so that the issue of protection of depositors can be distinguished from the issue at hand which is limited only to one of priority of payments between depositors and the two retrenched employees of the CCB in a situation in which Bank Negara has at the relevant time, elected to mount salvage operation under reg 9(1)(c).

In this appeal we are not concerned with questions of priority among creditors in a bankruptcy, winding up or administration. But we are concerned with the question of priority under an emergency 1986 legislation on the supervening insolvency of a co-operative bank established under the Co-operative Societies Act 1948. The appointment of receivers was made on a ministerial decision through Bank Negara under the Emergency Essential (Protection of Depositors) Regulations 1986. We are concerned with priority of payments, if any, under this particular emergency legislation in circumstances whereby the assets of the CCB is insufficient to satisfy all the liabilities of the co-operative bank. As far as priority of payments is concerned, reg 13 provides for only one priority, viz the costs, expenses, remunerations, etc of the receivers and persons appointed under the Emergency Regulations. The Regulations do not provide powers enabling the court to make an order for payment out of the deposit-taker's assets in such order of priority as the court thinks just amongst the unsecured creditors.

Although the object of the 1986 Emergency Regulations as the title reflects is for the protection of depositors, the issue arises as to whether in view of the limited scope of reg 13 regarding priority, the court can extend the intention of the legislature as expressed in that regulation so as to give priority to the depositors immediately after the receivers? The learned judge did not appear to have addressed his mind on this important issue. In other

words, can the court adopt a purposive approach in the interpretation of reg 13 in the face of its unambiguous provision and, secondly, can it be argued that by giving them priority, the court is protecting the depositors when the choice of giving them full protection is already vested in the hands of the Central Bank under reg 9(1)? In our judgment, if it is the intention of the legislature, to give depositors priority over employees' salaries and benefits as a means of protecting their interests, nothing would be simpler than expressing that intent in reg 13 or other provisions in the Regulations, just as it did in the case of receivers.

The purposive construction of statutes was first adopted by the House of Lords in the *Fothergill* v *Monarch Airlines*.[5] It is a well established principle that the purposive approach to the interpretation of legislation only applies where any doubt arises from the terms or words employed by the legislature. But where the words are precise and unambiguous, then the literal and strict construction rule should apply. In the present appeal as far as priority of payments is concerned, the legislature has made its intention very clear in reg 13 of the Emergency Regulations. There can be no doubt that the legislature intends to give priority only to the receivers and certain other persons and to no one else. In the absence of uncertainty in the terms employed, the legislative will must prevail, and as such we hold that the learned judge erred in law in giving priority of payments to the depositors in preference to the appellants. In the absence of enabling provisions in the legislation similar or equivalent to for example, ss 247(3) or 292 of the Companies Act 1965, the court has no discretionary power in this case to make any direction as to payment out of the assets of the CCB in such order for in reg 13. Whilst the learned judge was perfectly correct in giving priority to the receivers, he ought not to look at other unconnected legislation, such as s 47 of the Banking Act 1973 which expressly confers priority to deposit liabilities over all other liabilities, where a licensed bank becomes unable to meet its obligations. The CCB is not a licensed bank and accordingly it is not correct to adopt s 47 of the Banking Act 1973 even by analogy for the purpose of applying the purposive construction rule to the 1986 Regulations. Where there is no ambiguity in the legislation, the court has no other duty but to adopt the literal and strict construction rule even though the result may appear to produce an unpopular result. In the absence of expressed statutory provisions, we are therefore of the opinion that in this particular case the depositors' liabilities cannot be given priority over the retrenched employees' liabilities of the CCB.

The main thrust of the appellants' argument on priority is based on three authorities from other common law jurisdictions which they submit support the appellant's contention that they must be paid in priority to the depositors. It is their submission that in the absence of statutory provision, common law principles should apply on the issue of priority. The first was the Canadian case of *Maritime Life Assurance Co* v *Chateau Gardens (Hanover) Inc.*[6] According to counsel, the primary question for determination in that case was whether the receiver and manager was required to pay the retroactive wages owing to the employees pursuant to an arbitration award in priority to secured and unsecured creditors. The court directed the receiver and manager to pay the retroactive wages under the arbitration award to the employees as part of their administration of the business from the proceeds of the sale, such payment to be in priority to the claims of the secured creditors and the other unsecured creditors. The second authority is an Australian case of *International Harvester Export Co* v *International Harvester Australia Ltd*[7] in which the receivers sought direction from the court, inter alia, whether the receivers should pay to employees of the company out of the property of the company in respect of wages for services rendered to the company and further whether the arbitration award entered in 1981 was binding on the company. The court answered both questions in the positive. The third authority is an Indian case of *Workers of M/S Rohtas Industries Ltd* v *M/S Rohtas Industries Ltd*[8] where a company had closed down and had been declared a sick industry under s 3 of the Bihar Relief Undertakings (Special Provisions) Act 1981. It was put in argument that the liabilities of the company for payment to the workers could not be enforced from proceeds of sales of stock in trade. The financiers of the company also claimed priority over the sale of six finished products lying in stock because these goods had been pledged to them. The Supreme Court of India held that the wages and emoluments for the period up to closure should rank in priority, holding that 'their subsistence and living is also perhaps of paramount importance and has to rank with highest priority'. In our view, the courts deciding those three cases would appear to have a free hand in determining the question of priority of awards and wages relating to workers in relation to secured or unsecured creditors. They do not seem to have similar provision as reg 13 staring at them in the face. When there is an express statutory provision relating to priority, we cannot displace or improve it by resorting to decided cases of common law jurisdiction unless there is a lacuna or ambiguities in our law. We totally reject the argument of counsel for the appellants that decided cases by other common law jurisdictions which he describes as 'common law principles' should apply on the issue of priority in the present dispute, notwithstanding reg 13.

However, we wholly agree with the submission of counsel for the appellants that since there is no express provision in our 1986 Regulations to provide for priority of payments to depositors, we cannot read or imply into the laws a provision that depositors must be given priority over other creditors. Indeed, the speech of Lord Goddard CJ in *R* v *Wimbeldon Justices, ex p Derwent*[9] at p 384, relied

on by counsel that the court 'cannot add words to a statute or read words into it which are not there', and the statement of Rowlatt J in *Cape Brandy Syndicate* v *Inland Revenue Commissioners*[10] at p 71 that 'nothing is to be read, nothing is to be implied; one can only look fairly at the language used', lend support to what we have adverted to earlier, that where the words used by the legislature are clear, the purposive approach to interpretation of legislation must not be adopted. The court must stick to the plain meaning of the words used. However, what is good for the goose must also be good for the gander. There is no expressed provision either in the Regulations to provide for priority of payments to holders of Industrial Court awards; nor to employees whose claim for termination benefits or whose claim under a fixed term contract, are due for payments. It seems obvious to us that under reg 13, apart from the specified liabilities, all other liabilities have no priority and therefore must rank equally.

For the same reasons that we have denied priority being given to the depositors, we also reject the appellants' claim that they should instead take priority over the depositors. By the same token, their claims must rank equally with those of the depositors. It makes no difference whether the appellants' claims are based on statutory awards or merely under contracts of employment. Nor does it matter whether the final awards were made before or after the appointment of the respondents as receivers. We are not unmindful of the penal consequences of non-compliance with the Industrial Court unchallenged awards. But we are here concerned purely with the question of priority of payments under the Emergency Essential (Protection of Depositors) Regulations 1986. The two conflicting claims for priority of payments in this appeal are governed by the same Regulations and ought in principle to be determined according to that law and not to other legislation. Both the appellants must therefore rank in the same class as the depositors. CCB's assets must accordingly be applied pari passu in satisfaction of the depositors and employees liabilities subject only to the priority provided by reg 13.

For the reasons stated, we allow this appeal, set aside the order of the High Court, and order that both the appellants should rank equally with the depositors immediately after the receivers. In the circumstance of this case, we order that each party should pay its own costs both here and in the court below. Deposits in both these appeals are refunded to the appellants.

*Appeal allowed.*

Solicitors: *VK Lingam & Co; Adnan, Sundra & Low.*

Reported by *Prof Ahmad Ibrahim*

## Director-General of Inland Revenue v Khoo Ewe Aik Realty Sdn Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 01-8 OF 1989
LEE HUN HOE CJ (BORNEO), MOHAMED AZMI AND GUNN CHIT TUAN SCJJ
14 MAY 1990

*Revenue Law — Income tax — Sale of land — Whether constitutes adventure in nature of trade — Whether gains or profit derived from sale chargeable to income tax — Income Tax Act 1967, s 4(a)*

Khoo Ewe Aik (deceased) and his wife (also deceased) were landed proprietors in Penang and Khoo Ewe Aik owned the subject land. During their lifetime they formed and incorporated a family investment company, the respondent. The respondent was empowered, inter alia, under the memorandum of association to engage in land investment, land development and land improvement or to purchase and then sell land so purchased or land which constituted an investment. The respondent accepted the transfer of several landed properties from Khoo Ewe Aik and his wife. The respondent was subsequently authorized to transfer the shares of Khoo Ewe Aik and his wife to his children and grandchildren. In 1977, the respondent had submitted a layout plan for the construction of housing units for a housing scheme in respect of the subject land but this was later abandoned. There was no application for the sub-division of the subject land. It appeared that from 1977 to 1979 the respondent intended to become a housing developer selling luxury holiday bungalows but from 1980 the respondent again changed its intention from being that of a housing developer to that of an investor. Subsequently, the respondent sold the subject land. The respondent was assessed to income tax on the sale of the land. On appeal to the special commissioners, it was decided that the disposal of the land was not an adventure in the nature of trade and the profit of the disposal was not assessable to income tax and development tax. An appeal to the High Court was dismissed and the appellant appealed to the Supreme Court.

**Held,** dismissing the appeal:

(1) Under the Income Tax Act 1967, one may only appeal to the High Court and then to the Supreme Court on a question of law. The decision of the Special Commissioners of Income Tax on the facts is therefore conclusive. A court would not disturb the findings of fact by the Special Commissioners unless it considers that the only reasonable conclusion on the evidence contradicts the determination of the Special Commissioners.

(2) In this case there was sufficient evidence to support the Special Commissioners' determination that the respondent's sale of the subject land did not constitute an adventure in the nature of trade and that gains or profit derived from the sale were therefore not chargeable to tax under s 4(a) of the Income Tax Act 1967.

[Mendiang Khoo Ewe Aik dan isterinya adalah pemunya harta tanah di Pulau Pinang dan Khoo Ewe Aik adalah pemunya tanah yang berkenaan di dalam kes ini. Pada masa mereka hidup mereka telah menubuhkan syarikat pelaburan untuk keluarga mereka, iaitu responden. Responden telah diberi kuasa antara lain mengikut memorandum syarikat untuk mencebur diri dalam pelaburan tanah, pembangunan tanah dan pemajuan tanah atau membeli tanah dan menjual tanah itu atau tanah yang menjadi pelaburan. Responden telah menerima beberapa harta tanah